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IN THE

Supreme Court of the United States

E & L CONSULTING, LTD. d/b/a C.B.C. LUMBER, CO.; and C.B.C. WOOD PRODUCTS, INC.,

Petitioners,

v.

DOMAN INDUSTRIES LIMITED; EACOM TIMBER SALES LTD.; and SHERWOOD LUMBER CORP.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

Preliminary Statement.....1

I. THE SECOND CIRCUIT'S OPINION IS IN CONFLICT WITH RULINGS FROM OTHER CIRCUITS.....3

II. THE AMENDED COMPLAINT ASSERTS THAT THE EXCLUSIVE DISTRIBUTION AGREEMENT INVOLVED A MONOPOLISTIC SUPPLIER OF A UNIQUE PRODUCT, NOT A GARDEN-VARIETY COMPLAINT BY AN EXCLUSIVE DISTRIBUTOR WHO HAS BEEN REPLACED.....6

Conclusion 7

TABLE OF AUTHORITIES

Cases

Byars v. Bluff City News Co., 609 F.2d 843 (6th Cir. 1979).....4, 5

Elecs. Commc'ns Corp. v. Toshiba Am. Consumer Prods., Inc., 129 F.3d 240 (2d Cir. 1997).....6

Geneva Pharms. Tech. Corp. v. Barr Labs, Inc., 386 F.3d 485 (2d Cir. 2004).....3, 4

United States v. Visa U.S.A., Inc., 344 F.3d 229 (2d Cir. 2003).....4

Statutes

15 U.S.C. §1.....*passem*
15 U.S.C. §2.....*passem*

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PRELIMINARY STATEMENT

E&L Consulting, Ltd. and CBC Wood Products, Inc. petition for a writ of certiorari for review of the Opinion of the United States Court of Appeals for the Second Circuit upholding the dismissal of petitioners' Sherman Act claims based upon a finding that the Amended Complaint did not sufficiently allege an injury to competition. As set forth in the Petition, the Second Circuit's decision necessarily establishes a *per se* rule that exclusive distributorships, in and of themselves, cannot be challenged under the Sherman

Act because if it is permissible for a monopolistic supplier, as a matter of law, to assert its monopoly vertically into a resale market, any claim challenging an exclusive distributorship which eliminates competition at the resale level is effectively prohibited. Accordingly, the Second Circuit's decision in this case is contrary to the holdings of other circuits which have applied a rule of reason analysis to determine whether an exclusive distributorship agreement by a monopolistic supplier may illegally harm competition at the resale level so as to support a viable cause of action under the Sherman Act.

In opposition to the Petition, the Respondents assert that there is no conflict among the circuits because the Second Circuit has not expressly adopted a *per se* rule that exclusive distribution arrangements are legal, and that this action involves garden variety allegations by a terminated distributor. As explained below, although the Second Circuit has only expressly stated that there is a "presumption" that exclusive distributorships do not violate the Sherman Act – which presumption has never been adopted by this Court – the reasoning by the Second Circuit would necessarily apply to any assertion that an exclusive distributorship, in and of itself, violates the Sherman Act. Further, this is not a "garden variety" exclusive distributorship involving fungible brands of a freely interchangeable product, but involves an exclusive distributorship agreement entered into by a monopolistic supplier for a specific type of wood material for which it is alleged there are no adequate substitutes. Accordingly, this Court should determine in the context of this case whether challenges to exclusive distributorships between a monopolistic supplier and a reseller are still viable under the Sherman Act.

I. THE SECOND CIRCUIT'S OPINION IS IN CONFLICT WITH RULINGS FROM OTHER CIRCUITS

Respondents contend that there is no conflict among the circuits because the Second Circuit has not expressly adopted a *per se* rule that exclusive distributorship agreements are immune from liability under the Sherman Act. However, although the Second Circuit only states that exclusive distribution agreements are presumed legal, a presumption that has not been adopted by this Court, the actual import of the decision in this case is to effectively preclude any claim under the Sherman Act challenging an exclusive distribution arrangement.

Respondents do not explain how the Second Circuit's holding that, as a matter of law, competition to injury cannot be found by an exclusive distribution agreement because a supplier could distribute its product directly, would permit any claim under the Sherman Act challenging an exclusive distribution arrangement as improperly restricting competition at the resale level. The reasoning by the Second Circuit is such that injury to competition can never be alleged by reason of an exclusive distribution agreement so as to sustain a Sherman Act claim. Thus, even it is not called as much, a *per se* rule has been established.

In addition, the Opinion also makes clear that the prior Second Circuit holding in *Geneva Pharms. Tech. Corp. v. Barr Labs, Inc.*, 386 F.3d 485 (2d Cir. 2004) is reconcilable to such a *per se* rule because the finding of a valid claim in *Geneva* was based on factors other than the exclusive distribution arrangement. Specifically, the Second Circuit notes that *Geneva* involved an allegation of two temporary, related monopolies in different products, and "the two firms, which had overlapping ownership, were jointly involved in predatory practices," including making false representations (Pet. App. 10). Accordingly, the decision here makes clear that the exclusive arrangement in

Geneva was not the basis of allowing the Sherman Act claims to proceed. And, the Second Circuit stated that in *Geneva* the "general rule that 'it usually does not further harm competition for a monopolist in one market to leverage its advantage into a monopoly in a downstream market'" was acknowledged (Pet. App. 10).

Further, the Second Circuit's holding in *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003) is also reconcilable to the determination in the decision here precluding claims involving vertical restrain in the form of an exclusive distributorship arrangement. In *Visa U.S.A.*, the restrictions at issue included horizontal restraints and whether a vertical restriction by way of an exclusive distributorship is actionable was not at issue.

Accordingly, the Second Circuit's Opinion is clearly in contrast with the Sixth Circuit's holding in *Byars v. Bluff City News Co.*, 609 F.2d 843 (6th Cir. 1979), wherein it was held that a specific factual analysis must be undertaken to determine whether or not exclusive distributorship can be challenged under the Sherman Act. In *Byars*, it was explained that the factual analysis would include whether there are adequate substitutes that may be obtained by a retailer, as well as the overall effect on the retail market if resellers are eliminated by reason of an exclusive distribution arrangement.

The Sixth Circuit's approach in *Byars* is consistent with a rule of reason analysis of a challenge to an exclusive distribution arrangement. A Court should not just simply hold, as a matter of law, that a monopolistic supplier would be able to effectively eliminate competition at the resale level in and by itself, and thus the fact that a monopolistic supplier has entered into an exclusive distribution agreement cannot be the basis for a Sherman Act claim. The Second Circuit reasoning ignores the myriad of limitations on a monopolistic supplier's ability to act as a distributor,

including the ability to obtain the necessary infrastructure in a retail market such as stores, delivery points and employees.

Further, while it might be an accurate economic analysis to determine that a monopolistic supplier can only take one monopoly profit, this reasoning should not preclude a challenge to an exclusive distribution arrangement under the Sherman Act. The proper analysis under the Sherman Act is not with regard to the monopolistic profit, but the harm to competition. Here, there existed competing resellers which created limitations on the resale price of green hem fir lumber, and after this competition was eliminated by the exclusive distribution agreement which is sought to be challenged, these competitive restrictions on retail prices were eliminated and, in fact, resulted in a marked increase in the price for green hem fir lumber.

The Second Circuit undertook no factual analysis of the effect on the green hem fir market of this exclusive distribution agreement such as whether other adequate substitutes were available, nor whether the demand for green hem fir as compared to its supply was such as to provide both respondents with an incentive to eliminate competition at the resale level. Instead, at the pleading stages, the Second Circuit affirmed the dismissal of the Amended Complaint. The dismissal of the Amended Complaint, as a matter of law, only emphasizes that a *per se* rule has effectively been established immunizing exclusive distribution arrangements from challenge under the Sherman Act. By contrast, under the Sixth Circuit's reasoning in *Byars,* a factual analysis as to whether, in fact, the complained of exclusive distribution agreement harmed competition at the resale level would have been required, highlighting the conflict between the Circuits that should be resolved by this Court.

II. THE AMENDED COMPLAINT ASSERTS THAT THE EXCLUSIVE DISTRIBUTION AGREEMENT INVOLVED A MONOPOLISTIC SUPPLIER OF A UNIQUE PRODUCT, NOT A GARDEN-VARIETY COMPLAINT BY AN EXCLUSIVE DISTRIBUTOR WHO HAS BEEN REPLACED

Respondents contend that this is simply a case of a jilted distributor, and that all that is involved is a garden-variety dispute which was properly decided by the Second Circuit. To the contrary, this case does not involve an exclusive distribution arrangement for a brand-name product which is interchangeable with other brands, such as one brand of telephones that can easily be replaced by another brand (*see Elecs. Commc'ns Corp. v. Toshiba Am. Consumer Prods., Inc.*, 129 F.3d 240 [2d Cir. 1997]). Instead, this Amended Complaint asserts claims against a supplier who has monopolistic control of a unique product that has no adequate substitutes, which supplier is vertically imposing its monopoly at the resale level.

As such, this case presents an important issue of whether or not a monopolistic supplier of a unique product is free to enter into exclusive distribution arrangements, or may be required to make its product available to multiple resellers so as to allow competition at the resale level. This Court has not provided any recent guidance as to whether Sherman Act claims challenging an exclusive distribution arrangement are viable, and this Court should address this issue in the context of this case.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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